SUPREME COURT, U.
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APR 9
MICHAEL RODAK,

No. 73-1207

In the Supreme Court of the United States

OCTOBER TERM, 1973

PHILIP T. BERKLEY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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Petitioner, a self-taught securities analyst, advertised to sell his methods or rules for dealing in commodity futures. The Federal Trade Commission filed an administrative complaint on December 7, 1965, charging that petitioner's advertising was false, deceptive and misleading in violation of Section 5(a)(1) of the Federal Trade Commission Act, 15 U.S.C. 45(a)(1). In May, 1967, petitioner consented to an order to cease and desist (Pet. Exh. 2).[1] The order prohibited petitioner from representing (1) that his "methods" or rules had been

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[1]Exhibit 2 to the petition omits the first paragraph of the Commission's order, which provides:

> IT IS ORDERED that respondent Philip T. Berkley, an individual trading as Berkley Associates * * * in connection with the offering for sale, sale or distribution of publications on "Methods" or rules for dealing in commodity futures, or of advisory and managed accounts services for dealing in commodity futures, or of any similar or related publications or services, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from: * * *.

in existence for 15 years, and (2) that stated profits or earnings from actual trades based on, or which could have been predicted from, petitioner's "methods" were typical or could be expected generally if petitioner's methods were used. Petitioner was also prohibited from misrepresenting: (1) the extent to which his "methods" had been validated by experience, and (2) the profits or earnings derived by persons making use of petitioner's methods.

Between June, 1966, and April, 1967, Berkley submitted thirteen compliance reports to the Commission with proposed advertisements attached to each as exhibits. The commission instructed him: "To comply with the order your advertisements must make clear that your "Methods' are means of accounting for past market fluctuations after those fluctuations had taken place, and that rules such as yours that account for past behavior are substantially different from rules that would enable one to predict future market behavior" (Tr. 122; Pet. 24).

In 1968 and 1969, petitioner ran four advertisements which did not include the required disclaimer (see Pet. Exh. 1).[2] The government sued him, pursuant to Section 5(*l*) of the Federal Trade Commission Act, 15 U.S.C. §45(*l*), for civil penalties and injunctive relief for violation of the cease-and-desist order. The district court

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[2]The advertisement at the top of Exhibit 1 to the petition was run twice, once in the September 10, 1968 edition of the *Los Angeles Times*, and once in the September 12, 1968, edition of the *Journal of Commerce*.

granted summary judgment for the government. The district court held that petitioner had violated the order, imposed on $8,000 civil penalty, and enforced the order. The court of appeals summarily affirmed (Pet. 23).

The decisions below are correct and the petition for certiorari raises no question warranting further review.

Petitioner's advertisements (Pet. Exh. 1) violated the Commission's order in that they both misrepresented the extent to which petitioner's methods had been validated by experience and represented that stated profits were typical and to be expected generally by persons employing petitioner's methods.

The civil penalty of $8,000—$2,000 for each of four violations—was not excessive. Section 5(*l*) of the Federal Trade Commission Act, 15 U.S.C. 45(*l*), permitted a penalty of up to $5,000 for each violation. The district court did not abuse its discretion in imposing penalties of $2,000 for each violation.

Finally, petitioner argues that the court of appeals' summary affirmance without oral argument denied him due process of law. Oral argument on appeal, however, is not an essential element of due process and this Court and the courts of appeals summarily dispose of cases where, as here, the issues presented do not warrant oral argument.[3]

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[3] Petitioner challenges certain paragraphs of "Proposed Findings of Undisputed Facts and Conclusions of Law Pursuant to Local Rule 3(e) (4) (a)" which the government submitted in the district court. The court, however, did not adopt the proposed findings that petitioner challenges.

It is respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

APRIL 1974.

DOJ-1974-04